AND
BRIEFS

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No. 16-32

In the Supreme Court of the United States

KINDRED NURSING CENTERS LIMITED PARTNERSHIP, DBA WINCHESTER CENTRE FOR HEALTH AND REHABILITATION, NKA FOUNTAIN CIRCLE HEALTH AND REHABILITATION, ET AL.,

Petitioners,

v.

JANIS E. CLARK AND BEVERLY WELLNER, ET AL.,

Respondents.

On Writ of Certiorari to the Supreme Court of Kentucky

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS[1]

Respondents and their *amici* focus relatively little attention on the question presented: whether arbitration agreements are singled out for disfavored treatment by the Kentucky Supreme Court's rule—holding that a power of attorney expressly authorizing the attorney-in-fact to accept "contracts" does not convey the authority to accept an arbitration agreement without an additional, explicit reference to arbitration.

They instead broadly assert that the Federal Arbitration Act (FAA) and this Court's precedents have no role to play here. *E.g.*, Resp. Br. 15-25, 40-46; Supp. Br. 1-4. That contention is plainly wrong.[2]

First, respondents err in characterizing the issue presented here as one of contract formation. There is no dispute that respondents' respective principals executed power-of-attorney documents that appointed respondents as attorneys-in-fact; nor is there a dispute that respondents entered into arbitration agreements on behalf of their principals. The only question is whether those agreements should be enforced, the answer to which turns entirely on the *interpretation* of the powers of attorney, not their formation.

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[1] The Rule 29.6 Statement in the opening brief remains accurate.

[2] Respondents' Supplemental Brief is improper. Respondents cite Rule 25.5, but the only "intervening" development after they filed their initial brief was the filing of *amicus curiae* briefs in support of their position. We nonetheless explain why the issues raised in the Supplemental Brief lack merit.

A similar rhetorical maneuver was attempted by the respondent—and rejected by this Court—in *DIRECTV, Inc.* v. *Imburgia*, 136 S. Ct. 463 (2016). There is no legally significant difference between the Kentucky court's interpretation of the authority to make "contracts" in a power-of-attorney document and the California Court of Appeal's interpretation of the phrase "law of your state" in a consumer contract.

The interpretation of powers of attorney—like the interpretation of contract terms—must give effect to the intent of the parties based on the language of the document. And here—as in *Imburgia*—the state court adopted a "unique" interpretation "restricted to [the] field" of arbitration that failed to "place[] arbitration contracts on equal footing with all other contracts." *Imburgia*, 136 S. Ct. at 468-69 (quotation marks omitted).

Second, even if the Kentucky court's rule were a rule of contract formation, it would still be preempted by the FAA. States cannot impose added burdens on the formation of arbitration agreements any more than they can burden such agreements' enforceability. If the rule were otherwise, it would be trivially easy for States to disfavor arbitration and erect barriers to the creation of arbitration agreements, acting upon the very judicial hostility to arbitration that the FAA was enacted to prevent.

Third, respondents turn the Supremacy Clause on its head in protesting that application of the FAA here would violate separation-of-powers principles. As this Court underscored just last term, "[t]he Federal Arbitration Act is a law of the United States," and, "[c]onsequently, the judges of every State must follow it." *Imburgia*, 136 S. Ct. at 468.

Once respondents' claims about the FAA's inapplicability are eliminated, it is clear that the Kentucky court's ruling cannot stand. Here, as in *Imburgia*, the state court failed to honor the same "equal footing" principle that this Court has invoked time and time again to prohibit States from "singling out arbitration provisions for suspect status" in violation of the FAA. *Doctor's Associates, Inc.* v. *Casarotto*, 517 U.S. 681, 687 (1996); see also, *e.g.*, *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 339 (2011); *Perry* v. *Thomas*, 482 U.S. 483, 492 n.9 (1987). The Kentucky court's special rule for determining whether an attorney-in-fact is authorized to sign an arbitration agreement thus "disregards this Court's precedents on the FAA" (*Nitro-Lift Techs., LLC* v. *Howard*, 133 S. Ct. 500, 503 (2012) (per curiam)), and must be reversed.

I. The FAA Applies To The State-Law Interpretive Rule Announced Below.

Respondents attempt to evade the application of the FAA and this Court's precedents by asserting that the decision below is about "the *a priori* existence of an arbitration agreement." Resp. Br. 15-17. That argument is wrong on two counts: the issue here involves the enforceability of an arbitration agreement; and even if it did not, the FAA would still apply.[3]

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[3] Indeed, respondents' own *amici* agree that the FAA can preempt "state-law principles that govern how contracts are formed, whom they bind, how they are interpreted, and what defenses may exist to their enforcement." Pub. Citizen Br. 3-4; see also AAJ Br. 4. And while those *amici* argue that the decision below represents an application of ordinary contract prin-

A. The Challenged State-Law Rule Governs The Enforceability Of Arbitration Agreements.

This is a case about the interpretation of power-of-attorney documents to determine the enforceability of arbitration agreements.

1. It is undisputed that the principals (the nursing home residents) executed valid powers of attorney designating the respective respondents as their attorneys-in-fact. J.A. 7-13. Each respondent signed the admission paperwork on behalf of his or her principal. Pet. App. 6a-7a. There is no dispute that each respondent also separately signed an optional arbitration agreement. J.A. 20, 27. It is further undisputed that each arbitration agreement is in writing and evidences a transaction involving commerce, and is therefore subject to the FAA. 9 U.S.C. § 2; *Ping* v. *Beverly Enters., Inc.*, 376 S.W.3d 581, 589-90 (Ky. 2012) (holding that the FAA applies "to arbitration provisions in nursing home admission contracts"; collecting authorities); accord *Allied-Bruce Terminix Co.* v. *Dobson*, 513 U.S. 265, 270, 274-75 (1995) (holding that the FAA reaches to the full extent of Congress' power over interstate commerce).[4]

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ciples, that contention is demonstrably incorrect. See Part II, *infra*.

[4] Respondents cite (Supp. Br. 2) *Breazeale* v. *Victim Services, Inc.*, 2016 WL 4059258 (N.D. Cal. 2016), which held that an arbitration agreement in a non-prosecution agreement between a State District Attorney and a criminal suspect regarding a potential state-law criminal violation did not implicate a transaction involving commerce because the agreement arose from plea bargaining. *Id.* at *3-5. Whatever the merits of *Breazeale*, the arbitration agreements here evidence transactions in interstate

The only question in this case, then, is whether the arbitration agreements should be enforced. And the answer to that question depends not on disputes over the *formation* of either the arbitration agreements or the powers of attorney, but rather on the *interpretation* of the power-of-attorney documents to determine the scope of the authority conferred.

Respondents' argument that the power-of-attorney documents do not themselves contain arbitration provisions (Supp. Br. 2) does not allow the State to avoid applying generally-applicable principles of law to determine the authority that those documents gave respondents. What the court below did—and what Section 2 of the FAA squarely forecloses—was to condition the enforceability of *arbitration agreements* signed by attorneys-in-fact, and governed by the FAA, on complying with a novel explicit-reference requirement that is not applicable in determining an attorney-in-fact's authority to enter into other kinds of contracts. See 9 U.S.C. § 2 (providing that written agreements to arbitrate disputes are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract"). Thus, as Justice Noble noted in dissent, the majority's interpretive rule does not actually "affect[] the *formation* of a contract to arbitrate." Pet. App. 100a.

2. One set of *amici* focuses on the principle that a "third party generally may not commit a non-party to a contractual relationship" unless authorized to do so under "'traditional principles of state law.'" AAJ Br. 6 (quoting *Arthur Andersen LLP* v. *Carlisle*, 556 U.S.

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commerce, and respondents did not argue otherwise below; nor did the Kentucky court hold otherwise.

624, 631 (2009)) (some quotation marks omitted). That argument is puzzling, because the entire question here is whether the lower court applied generally-applicable legal principles, as the FAA requires.

Indeed, this Court in *Arthur Andersen* explained that state law "is applicable to determine which contracts are binding under § 2 and enforceable under § 3" only "'*if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts *generally*.'" 556 U.S. at 630-31 (emphasis added) (quoting *Perry*, 482 U.S. at 492 n.9); see also *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 944 (1995) (holding that federal courts determine whether an arbitration agreement was formed based on "*ordinary* state-law principles that govern the formation of contracts.") (emphasis added).[5]

3. It is no answer for respondents to assert that "[Kentucky] courts are the ultimate authority" on Kentucky agency or contract law; the same was true of the California courts in *Imburgia*. 136 S. Ct. at 468. The FAA requires this Court to "decide whether the decision of the [Kentucky] court places arbitration contracts on equal footing with all other contracts" (*ibid.* (quotation marks omitted))—and to hold preempted a state-law rule that fails that test. See also Pet. Br. 31-32.

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[5] As *amici* concede, "agency" is a traditional principle of state law that can bind a nonparty to an arbitration agreement (AAJ Br. 9-10), and in Kentucky (as elsewhere), "[a] power of attorney creates an agency relationship between the principal and the agent." *Select Portfolio Servicing, Inc.* v. *Blevins*, 494 S.W.3d 510, 514 (Ky. Ct. App. 2016) (citing *Ping*, 376 S.W.3d at 591).

Respondents principally attempt to distinguish *Imburgia* by arguing that *Imburgia* involved judicial interpretation of a contract while this case involves judicial interpretation of power-of-attorney documents. Resp. Br. 19, 40; see also *id.* at 12, 25-27 (arguing that the decision below "did not announce a rule of contract law").

But any "state-law principle" that is used to refuse enforcement of an arbitration agreement runs afoul of the FAA if it "takes its meaning precisely from the fact that a contract to arbitrate is at issue" (*Perry*, 482 U.S. at 492 n.9) or is applied "in a fashion that disfavors arbitration." *Concepcion*, 563 U.S. at 341; see also Pet. Br. 13-14.

Moreover, respondents advance a distinction without a difference. A power of attorney is a particular type of formal instrument under which the principal confers certain authority on the agent. That is why powers of attorney "should be construed in accordance with the rules for interpreting written instruments generally." *Villanueva* v. *Brown*, 103 F.3d 1128, 1136 (3d Cir. 1997); see also Resp. Br. 27 (interpreting a power-of-attorney document requires "construing the writing" to give effect to the intent of the principal) (quoting *Gabby* v. *Roberts*, 35 S.W.2d 284, 285 (Ky. 1931)).

Accordingly, respondents' remarkable assertion that *Imburgia* would have turned out differently had the California court been construing "the intentions of the parties" holds no water. Resp. Br. 13, 40. Indeed, this Court made clear that the California court *was* purporting to construe the intentions of the parties. See 136 S. Ct. at 468 ("The Court of Appeal decided that, as a matter of contract law, the parties did mean the phrase 'law of your state' to refer to

[preempted state law]"). The problem was that "[t]he Court of Appeal did not explain why parties might generally intend the words 'law of your state' to encompass '*invalid* law of your state'" (*id.* at 469)—just as the court below did not offer any coherent explanation why a principal conferring a broad authority to make "contracts" generally intends to confer authority to make any kind of contract except a dispute-resolution agreement.

Indeed, respondents' argument that a principal "may discriminate against arbitration as much as he or she wants" (Resp. Br. 39) only reinforces the parallel to *Imburgia*. Just as, "[i]n principle, [parties] might choose to have portions of their contract governed by the law of Tibet, the law of pre-revolutionary Russia, or (as is relevant here) the law of California including the *Discover Bank* rule and irrespective of that rule's invalidation in *Concepcion*" (136 S. Ct. at 468), so too might a principal choose to confer on his attorney-in-fact the authority to make all contracts on his behalf except dispute-resolution agreements.

But the question is whether the principal *actually did so*, and what the court may not do, "consistent with the [FAA]" (*ibid.*), is adopt a unique rule that a power of attorney broadly authorizing an attorney-in-fact to enter into "contracts" really (and illogically) excludes one type of contract—dispute-resolution agreements—from that authorization.[6]

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[6] Respondents also state that, because the FAA provides for a jury trial if "the making of the agreement for arbitration" is "in issue" (9 U.S.C. § 4), that provision somehow justifies reserving to state courts the ultimate right to decide disputes over the interpretation of powers of attorney and the authority that they

B. The FAA Preempts State-Law Rules That Make Arbitration Agreements More Difficult To Form Than Other Contracts.

Even if respondents were right that the explicit-reference rule announced below applies solely to contract formation, the FAA would still apply, for several reasons.

First, respondents cite no relevant authority for the proposition that the FAA is categorically inapplicable to contract-formation disputes. They point to *Buckeye Check Cashing* v. *Cardegna*, 546 U.S. 440 (2006) in passing (Resp. Br. 16), but the issue in that case was completely different. *Buckeye* applied the rule of severability in distinguishing between challenges to the validity of a contract as a whole—which are ordinarily reserved to an arbitrator—and challenges "to the arbitration clause itself," which generally are decided by a court. *Buckeye*, 546 U.S. at 444-46 & n.1. *Buckeye* certainly did not exclude formation disputes from the FAA's ambit.

Beyond that, respondents cherry-pick a passage from the 1924 submission to Congress by Julius Henry Cohen, one of the drafters of the FAA. Supp. Br. 3. But Cohen's statement that "whether or not a contract exists is a question of the substantive law of the jurisdiction wherein the contract was made" is

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confer. Resp. Br. 44-46. But the jury trial right under the FAA is limited to addressing factual disputes about contract formation, and there is no factual dispute here; as respondents elsewhere acknowledge, "[i]n Kentucky, determination of the intent encompassed in a power of attorney is a matter of law, and a matter for the courts." *Id.* at 3 n.1. Likewise, the question whether the FAA precludes the legal rule announced below is a pure issue of law appropriate for resolution by this Court.

entirely consistent with this Court's repeated pronouncements that whether an arbitration agreement was formed is based on "ordinary state-law principles that govern the formation of contracts." *First Options*, 514 U.S. at 944 (citing, *inter alia*, *Perry*, 482 U.S. at 492 n.9). Nothing in the FAA or this Court's precedents suggests that *all* state-court rules of contract formation—even those that single out arbitration for suspect status and reflect the judicial hostility that the FAA was enacted to prevent—are insulated from the FAA.[7]

Second, respondents have no convincing response to decisions expressly holding that the FAA's reach extends to state laws that prohibit the formation of arbitration agreements. Pet. Br. 32 (citing *Saturn Distribution Corp.* v. *Williams*, 905 F.2d 719 (4th Cir. 1990); *Sec. Indus. Ass'n* v. *Connolly*, 883 F.2d 1114, 1117 (1st Cir. 1989)). They ignore *Connolly* entirely and try to distinguish *Saturn* solely on the basis that it involved "statutory law" rather than a judicially-created rule. Resp. Br. 21.

That attempted distinction is squarely foreclosed by this Court's precedents. As we pointed out in our opening brief, "the FAA preempts any 'state law, whether of legislative *or judicial* origin,' that disfavors arbitration." Pet. Br. 14 (quoting *Perry*, 482 U.S. at 492 n.9 (emphasis added)); see also *Casarotto*, 517 U.S. at 687 n.3. The same rationale defeats respondents' attempt to distinguish *Casarotto* on the grounds

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[7] Indeed, the majority below itself stated that "the question of whether an arbitration agreement was ever formed is a matter of state law, so long as the state law in question *does not single out arbitration agreements*." Pet. App. 44a (emphasis added; quotation marks omitted).

that it involved a "legislative" mandate rather than a judicial one. Resp. Br. 22.

Third, respondents fail to acknowledge the absurd results that would flow from their proposed approach. States would have carte blanche to impose laws blatantly disfavoring arbitration so long as those discriminatory standards applied to the formation of new arbitration agreements rather than to existing ones. See Pet. Br. 33-34. Respondents cannot explain how "restrict[ing] the FAA to existing agreements" would avoid "allow[ing] [S]tates to 'wholly eviscerate Congressional intent to place arbitration agreements upon the same footing as other contracts.'" *Saturn*, 905 F.2d at 722-23. Indeed, they appear to embrace that impermissible result, arguing that the decision below is immune from the Supremacy Clause "[r]egardless of how the Kentucky Supreme Court came to its conclusion." Supp. Br. 4.

Finally, respondents caricature our position in arguing that "the FAA does not exist to make arbitration agreements easier to form." Resp. Br. 12. That's not the issue here. As this Court has held time and again, the "equal footing" principle embodied by Section 2 of the FAA does preclude States from conversely making arbitration agreements *harder* to form or enforce than other types of contracts. *E.g.*, *Imburgia*, 136 S. Ct. at 468-69; *Concepcion*, 563 U.S. at 339; *Casarotto*, 517 U.S. at 687; *Perry*, 482 U.S. at 492 n.9. Because the decision below does just that, it cannot stand under the FAA.

C. Application Of The FAA Here Does Not Threaten To Federalize State Agency Or Contract Law.

Respondents' final bid to avoid application of the FAA is to assert, much as they did at the petition stage (Opp. 34), that reversal would "federaliz[e] all sorts of State law determinations regarding agency and authority" and amount to a commandeering of state courts. Resp. Br. 40-44.

These hyperbolic contentions run headlong into the Supremacy Clause, which "forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source." *Imburgia*, 136 S. Ct. at 468 (quotation marks omitted). As this Court has recognized, because "[s]tate courts rather than federal courts are most frequently called upon to apply the * * * FAA," "[i]t is a matter of great importance * * * that state supreme courts adhere to a correct interpretation of the legislation." *Nitro-Lift Techs.*, 133 S. Ct. at 501; see also *Marmet Health Care Center, Inc.* v. *Brown*, 565 U.S. 530, 531 (2012) (per curiam) ("When this Court has fulfilled its duty to interpret federal law, a state court may not contradict or fail to implement the rule so established.").

Far from "federalizing the State law of agency to a large extent" (Resp. Br. 44), this case, like *Imburgia*, requires nothing more than applying the unexceptional "equal footing" principle that this Court has invoked many times to police States that have treated arbitration agreements differently from other contracts. See *Casarotto*, 517 U.S. at 687 (noting that the FAA "preclude[s] States from singling out arbitration provisions for suspect status"); see al-

so, *e.g.*, *Concepcion*, 563 U.S. at 339; *Perry*, 482 U.S. at 492 n.9.[8]

II. The Decision Below Conflicts With The FAA And Defies This Court's Precedents.

A. The Explicit-Reference Rule Cannot Be Justified Under General Principles Of Kentucky Law.

The Kentucky Supreme Court has actually required explicit authorization in a power of attorney for only one type of contract—arbitration agree-

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[8] An *amicus* law professor urges this Court to overrule *Southland Corp.* v. *Keating*, 465 U.S. 1 (1984), and hold the FAA inapplicable in state courts. Szalai Br. 11-23. *Stare decisis* provides reason alone to reject that request. Pet. Br. 18-19 (citing *Kimble* v. *Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409-10 (2015)); see also *Allied-Bruce*, 513 U.S. at 283-84 (O'Connor, J., concurring) (refusing to vote to overrule *Southland* on the basis of *stare decisis*; "as the Court points out, more than 10 years have passed since *Southland*, several subsequent cases have built upon its reasoning, and parties have undoubtedly made contracts in reliance on the Court's interpretation of the Act in the interim"). The reasons that the majority in *Allied-Bruce*, along with Justice O'Connor's concurrence, identified for according *Southland stare decisis* effect have only been reinforced further by the passage of two additional decades.

In all events, respondents have never challenged the continued vitality of *Southland*, nor did the parties brief the issue "at any stage of this litigation," which is an independent reason for the Court to "not consider it." *Atl. Marine Constr. Co.* v. *Dist. Ct. for the Western Dist. of Texas*, 134 S. Ct. 568, 580 (2013).

Finally, the same law professor argues that personal-injury claims are categorically excluded from the FAA. But this Court has squarely held that the "statute's text includes no exception for personal-injury or wrongful-death claims." *Marmet*, 132 S. Ct. at 1203. And respondents have never suggested, much less asked, that *Marmet* be overruled.

ments. Respondents and their *amici* labor mightily to shoehorn this arbitration-specific rule into a general principle of Kentucky law. But they cannot: the decision below is a paradigmatic example of a state-law rule that targets arbitration agreements, and is therefore preempted by the FAA.

The lower court's "explicit-reference rule" is not a general application of Kentucky agency law; nor is it a construction of powers of attorney in general. And the rule does not apply even-handedly to the waiver of all constitutional rights, nor to—as respondents have contended—all "acts fraught with major legal implications for the principal." Resp. Br. 28 (quoting RESTATEMENT (THIRD) OF AGENCY § 2.02 cmt. h. (2006)).

1. The explicit-reference rule does not apply to all kinds of contracts, nor does it comport with generally-applicable principles for interpreting powers of attorney.

Respondents bear the burden of demonstrating that the legal rule applied below is a "ground[] as exist[s] at law or in equity for the revocation of *any* contract." 9 U.S.C. § 2 (emphasis added). They cannot come close to meeting that standard.

First, respondents argue that *Ping* and other cases stand for the proposition that a power of attorney must be "strictly construed" under Kentucky law (*e.g.*, *Rice v. Floyd*, 768 S.W.2d 57 (Ky. 1989)). Resp. Br 27, 31. In fact, those cases hold only that unbounded general language in a power of attorney—such as the power "to do and perform any, all, and every act and thing whatsoever requisite and necessary to be done" or to do all that the principal "might or could do if personally present" (*Ping*, 376 S.W.3d

at 590-92)—must be construed in tandem with the power of attorney's specific grants of authority.

That proposition is irrelevant here, because the source of respondents' authority to agree to arbitration was the *specific, express* authority to make or enter into contracts. J.A. 7, 10-11; see also Resp. Br. 6 (quoting the language in the Clark power of attorney "*specifically authoriz[ing]* my attorney in fact * * * [t]o draw, make, and sign in my name any and all checks, promissory notes, contracts, deeds, or agreements").[9]

Second, respondents fail to counter our demonstration that explicit authorization is *not* necessary to confer the authority to enter into a forum selection clause under Kentucky law—even though such clauses may also waive a party's constitutional rights. Pet. Br. 26. They claim that a decision by a federal court in Ohio supports their argument (Resp. Br. 29 (citing *Baker* v. *LeBoeuf, Lamb, Leiby & MacRae*, 1993 WL 662352, at *9 (S.D. Ohio 1993))), but they are incorrect. Rather, *Baker* held that defendants who were not parties to or third-party bene-

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[9] Respondents and their *amici* acknowledge that Justice Abramson (now Hughes), who authored *Ping*, was the principal *dissenter* below (Resp. Br. 11, 36), yet they ignore her cogent explanation of why *Ping* does not apply. See Pet. App. 70a-74a.

Respondents' reference to the fact that Kentucky has not adopted the Uniform Power of Attorney Act (Resp. Br. 14; see also AAJ Br. 19-20) is a non-sequitur. While Section 203 of the Uniform Power of Attorney Act provides that general language "to do all acts that a principal could do" authorizes the principal to "submit [the principal's claims] to alternative dispute resolution" (Uniform Power of Attorney Act § 203(4)), petitioners are not relying on such language as the basis for enforcement of the arbitration agreements here.

ficiaries of a contract containing a forum-selection clause could not enforce that clause against the plaintiffs with whom they had an attorney-client relationship created by a power of attorney that did not itself contain a forum-selection clause.

Third, respondents quibble with our observation (Pet. Br. 22) that Kentucky law has no similar explicit-reference requirement in its guardianship statutes, but we have not argued, as respondents suggest (Resp. Br. 31, 37-39), that attorneys in fact and State-appointed guardians are equivalent. The key fact is, as respondents recognize, the Kentucky Court of Appeals (like the federal court decisions that we cited in our opening brief) has held that guardians' statutory authority to enter into contractual relationships includes the power to enter into predispute arbitration agreements. *Id.* at 37 (citing *LP Pikeville, LLC* v. *Wright*, 2014 WL 1345293 (Ky. Ct. App. 2014)).

Their suggestion that the grant of review and the possibility of reversal by the Kentucky Supreme Court in *Wright* should insulate the decision below from criticism, however, is misplaced. On the contrary, while respondents are correct that "[w]hether or not a State legislature may discriminate against arbitration in its State guardianship statutes is of course a different question" than the one presented here (Resp. Br. 39), the possibility that the court below will compound its erroneous interpretation of the FAA in future cases is all the more reason to correct it now. See *Nitro-Lift*, 133 S. Ct. at 501; *Marmet*, 565 U.S. at 531.

Finally, respondents echo the majority's conclusion that the Wellner power of attorney's authorization to make "contracts * * * in relation to * * * per-

sonal property" does not encompass predispute arbitration agreements. Resp. Br. 6. But they also concede, as did the majority, that "a chose-in-action is property under Kentucky law." *Id.* at 9; see also Pet. App. 36a; *Button* v. *Drake*, 195 S.W.2d 66, 69 (Ky. 1946). Thus, they are left simply repeating the majority's spurious assertion that an agreement to arbitrate a principal's legal claims somehow does not relate to those claims. Resp. Br. 9-10; Pet. App. 37a. Indeed, respondents do not engage at all with our discussion of both the dissent's powerful rebuttal to this point and this Court's decisions similarly recognizing that a cause of action is a species of property. Pet. Br. 23.[10]

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[10] One of respondents' *amici* tries a different tack, arguing that the language in the Wellner power of attorney does not authorize predispute arbitration agreements on the theory that future legal claims that have not accrued are not yet property. Pub. Citizen Br. 12. They quote *Button* for the proposition that a chose in action creates a right "not reduced to possession," but that proposition does not advance their theory, because (as this Court has observed) immediate reducibility to possession is not the defining characteristic of a property right. See *Sprint Commc'ns Co.* v. *APCC Servs., Inc.*, 554 U.S. 269, 275 (2008) (noting that a "'chose in action'" is "an interest in property not immediately reducible to possession"). Moreover, it would be nonsensical to limit the authority to make contracts in relation to personal property to cover only the principal's existing property interests—that would yield the illogical result, for instance, that the attorney-in-fact could sell the principal's existing possessions at the time the power of attorney was executed but not future possessions that the principal has yet to acquire.

2. The explicit-reference rule cannot be salvaged by calling it a rule that applies generally to transactions with "significant legal consequences."

Respondents offer little in response to our demonstration—and that of the principal dissent below—that the majority's own reasoning impermissibly targets only those constitutional rights that are inherently affected by arbitration agreements. See Pet. Br. 24-26. And they do not directly engage at all with our showing that upholding the decision below would leave States free to discriminate against arbitration in countless ways. *Id.* at 29-30.

They instead resort to the majority's invocation of the rule that actions with "significant legal consequences" for the principal are "not to be inferred lightly." Pet. App. 39a (quoting RESTATEMENT (THIRD) OF AGENCY § 2.02 cmt. h); Resp. Br. 28.

But the majority itself recognized that there was nothing to "infer[]" in the Clark power of attorney's "broad grant of authority" to make contracts and therefore the rule did not apply (Pet. App. 39a). Thus, this principle of agency law plainly did not supply the basis for the majority's decision. Rather, the majority's explicit-reference requirement turned on its elevation of the jury trial right to sacrosanct status—an elevation that conflicts with the FAA's purposes. Pet. Br. 17-29.

It is also telling that neither respondents nor their *amici* are able to articulate any other transactions to which the explicit-reference rule might apply beyond the parade of improbable horribles trotted out by the majority. They instead rest on the majority's example that an attorney-in-fact entering into an

arbitration agreement on behalf of her principal would be as unexpected and significant as the attorney-in-fact binding the principal to an arranged marriage. Resp. Br. 29-30; AAJ Br. 18-19. To state the comparison is to refute it: as the dissent below pointed out, arbitration agreements "are commonplace," unlike this fanciful example. Pet. App. 97a; see also Pet. Br. 28-29.

The example—along with *amici*'s observation that Kentucky law precludes an attorney-in-fact from authoring a will for a principal (AAJ Br. 19)—also misses the point more broadly. States are generally free as a policy matter (consistent with constitutional constraints) to impose requirements on the validity of marriages or wills that do not apply to other kinds of contracts or written instruments. *E.g.*, Ky. Rev. Stat. § 394.040 (requiring two witnesses to a will not written entirely by the testator); *id.* § 402.050 (solemnization and two-witness requirements for marriages). But the FAA precludes States from erecting similar hurdles to the formation or enforceability of arbitration agreements when those requirements do not apply to *all* contracts. See pp. 3-11, *supra*.

Likewise unavailing is *amici*'s attempted comparison between the waiver of a jury trial inherent in an arbitration agreement and the judicial colloquy required for a criminal defendant to waive his right to a jury trial. AAJ Br. 10-12. *Amici* ignore entirely the numerous cases rejecting arguments that a heightened "knowing and voluntary waiver" standard applies to the enforcement of an arbitration agreement. Pet. Br. 26 n.7. If anything, the attempted comparison only reinforces the point made by the dissent below: as a matter of Kentucky law and his-

tory, the jury trial right takes on much greater importance in criminal felony cases than in civil disputes. *Id.* at 24 n.6; App. 89a-90a n.26.

3. The FAA precludes policy-based exceptions for nursing home-related claims.

Several *amici* further suggest that the explicit-reference rule is warranted by perceived problems concerning resident care in the nursing home industry. AARP Br. 13-20; Pub. Citizen Br. 4-6. But this suggestion suffers from at least three fundamental flaws.

First, this Court's decision in *Marmet*, which also involved nursing home-related claims, squarely rejected West Virginia's attempt to exclude such claims from the FAA's reach on policy grounds as "contrary to the terms and coverage of the FAA." 565 U.S. at 533; see also n.8, *supra*.

Second, state public policy concerns can neither substitute for nor override congressional judgment. See *14 Penn Plaza LLC* v. *Pyett*, 556 U.S. 247, 270 (2009) (holding that the FAA precludes reliance on "judicial policy concern[s] as a source of authority" for refusing to enforce arbitration agreements); see also *Concepcion*, 563 U.S. at 342 (explaining that the FAA was enacted to eliminate the "'great variety' of 'devices and formulas' declaring arbitration against public policy"). *Amici*'s policy arguments are properly directed to Congress, not the courts.

Third, these policy arguments are also wrong. They all stem from the erroneous premise that arbitration is inadequate to protect the rights of nursing home residents and their families. But as *amici* in support of petitioners explain, nursing home residents and their representatives fare comparably in

arbitration and litigation, and arbitration results in lower costs and quicker resolution of their claims. Am. Health Care Ass'n Br. 5-8; Genesis Healthcare Br. 12-17; see also Chamber of Commerce Br. 3-13 (collecting "data confirm[ing] that arbitration is cheaper and faster than litigation and produces fair outcomes" in general).

This Court has likewise repeatedly acknowledged the "advantages" of arbitration. *Allied-Bruce*, 513 U.S. at 280; see also, *e.g.*, *Concepcion*, 563 U.S. at 345; *14 Penn Plaza*, 556 U.S. at 257; *Mitsubishi Motors Corp.* v. *Soler Chrysler Plymouth, Inc.*, 473 U.S. 614, 628 (1985). Indeed, "we are well past the time when judicial suspicion of the desirability of arbitration and the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution." *Mitsubishi*, 473 U.S. at 626-27.

Finally, respondents and their *amici* cannot justify the hostility to arbitration reflected by the decision below by pointing out *other* cases in which the Kentucky Supreme Court has enforced arbitration agreements. See Resp. Br. 25-26; AAJ Br. 24. The question presented is whether the explicit-reference rule announced in *this case* comports with the FAA, and it does not.

For all of these reasons, the Kentucky court's explicit-reference rule cannot be saved from preemption as an even-handed application of Kentucky law.

B. The Explicit-Reference Rule Is Inconsistent With This Court's Precedents.

Based on this Court's statements that "a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration," *First Op-*

tions, 514 U.S. at 945, and that the delegation of issues of arbitrability to an arbitrator must be "clear and unmistakable," *Rent-A-Center, West, Inc.* v. *Jackson*, 561 U.S. 63, 69-70 & n.1 (2010), *amici* assert that "courts ought to hesitate to interpret silence as to the waiver of constitutional rights in an agency agreement to permit waiver." AAJ Br. 14; see also Pub. Citizen Br. 15-17. Their argument appears to be that the specificity required under *First Options* and *Rent-A-Center* should also apply to powers of attorney.

But these analogies do not work. *First*, this Court's precedents do not require parties to spell out by name each of the issues that are within the scope of their arbitration agreements. For instance, an arbitration provision covering "all claims or controversies between the parties" means just that—all disputes—without the need to list what those disputes might be. For the same reason, the authority in a power of attorney to make "contracts" covers all contracts, without the need to spell out what contracts those might be. In other words, the powers of attorney were far from "silen[t]" on the matter at hand; it is enough that the powers of attorney expressly authorized the attorneys-in-fact to make or enter into contracts.

Second, the specificity that this Court requires for the delegation of issues of *arbitrability* is based on an underlying *federal* default rule: that a court, and not an arbitrator, will decide threshold questions of arbitrability, such as whether the arbitration agreement is enforceable. But the FAA precludes a *State* from adopting a default rule that requires heightened specificity only with respect to arbitration agreements. *E.g.*, *Casarotto*, 517 U.S. at 687-88.

CONCLUSION

The judgment of the Kentucky Supreme Court should be reversed.

Respectfully submitted.

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